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No. 95-210

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCALS 391, 29, 71, 355, 592, 657, 988,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR THE RESPONDENT UNIONS

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioners' live haul workers (chicken catchers, forklift drivers and live haul drivers) are National Labor Relations Act "employees" within the meaning of NLRA § 2(3), 29 U.S.C. § 152(3), and not exempted "agrivultural laborers" within the meaning of that provision.

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BRIEF FOR THE RESPONDENT UNIONS

The opinions below, the basis for this Court's jurisdiction, and the statutory provisions involved are set out at pp. 1-3 of the Brief for the Petitioners.

COUNTERSTATEMENT OF THE CASE

The facts that frame the question presented are fully set out in the following two paragraphs of the opinion below:

> The [Holly Farms] Wilkesboro plant is a vertically integrated poultry operation. In its hatchery operations, Holly Farms hatches pullets, or laying hens. At twenty weeks of age, the pullets are transferred to "laying houses" operated by independent "contract growers." The eggs produced by the pullets are

transported back to the Holly Farms hatchery operations, where they are hatched. The Company transports the resulting chicks to independent contract growers who are paid to raise the chicks into full-grown broiler chickens. When the birds are seven weeks old, the live-haul crews catch, cage, and transport them to a storage and cooling area near the processing plant, where they will be slaughtered and prepared for market.

The employees in the live-haul unit serve as the Wilkesboro facility's chicken-catching crews. A crew consists of a live-haul truck driver, a forklift operator, and about nine "chicken catchers." The live-haul driver drives a flat-bed truck, which carries the entire crew to the farms of the independent contract growers who raise the broiler chickens. Under cover of darkness, the chicken catchers manually catch and cage the chickens, the forklift operator places the steel cages on the flat-bed truck, and the truck delivers the chickens to a storage area near the Company's processing plant. [48 F.3d at 1369-70 (footnote omitted).]

SUMMARY OF ARGUMENT

Live haul workers employed by vertically integrated poultry companies collect full grown broilers from the independent contract farms where the chickens are raised and transport the broilers to the companies' processing plants. The line-drawing issue in this case is whether these live haul workers are doing work incident to the companies' processing operations (and are therefore "employees" covered by the National Labor Relations Act) or incident to the farming operations of raising the broilers (and are therefore "agricultural laborers" exempted from coverage under the NLRA).

The legal determinants of the line to be drawn are well settled. The live haul workers are exempted from coverage under the NLRA if, but only if, those workers

are involved in "agricultur[al]" operations as that term is defined in § 3(f) of the Fair Labor Standards Act. Under the express language of FLSA § 3(f), the raising of chickens is an agricultural operation. On the other hand, as this Court recognized in *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298 (1977), the processing of chickens for ultimate sale to the consumer (*e.g.*, the slaughtering and dressing of the chickens) is *not* an agricultural operation. *Infra* at 4-6.

The factual determinants of the line to be drawn are equally definite. Through the exercise of their economic leverage over independent contract farmers, the vertically integrated poultry companies, like petitioners here, have structured their overall business in a manner that (i) limits the independent farmer's function to the raising of chickens; and (ii) assures that the company's own processing plant employees—using the company's own equipment—perform all live haul operations. And the integrated poultry companies have done so precisely to facilitate the efficient use of the companies' highly capitalized processing plants. All this being so, the various live haul operations at issue here are classified by the industry and by independent experts as a component part of the companies' "processing" operations and not as a component part of the contract farmers' chicken raising operations. *Infra* at 6-10.

Not surprisingly, then, the NLRB has consistently taken and adhered to the position that the integrated poultry companies' live haul workers are doing work incidental to the companies' non-exempt processing operations rather than incidental to exempted farming operations. And the NLRB's position finds strong support in a directly-on-point Department of Labor interpretive regulation (29 CFR § 780.143) elaborating on FLSA § 3(f). *Infra* at 10-13.

The plain language of FLSA § 3(f) does not answer the precise line drawing legal question presented here.

And the Board's resolution of that question is entirely consistent with the purposes of Congress in exempting "agricultur[al]" operations from both the FLSA and the NLRA. In these circumstances, the NLRB's eminently reasonable judgment of where to draw the line between agricultural and nonagricultural operations in the specific context of the vertically integrated poultry industry is entitled to substantial deference and should be affirmed. *Infra* at 13-14.

ARGUMENT

This case presents a single, line-drawing question—albeit one that runs through a major American industry: in the specific context of vertically integrated broiler chicken production where does "agriculture" end and where does "processing" begin.

This question arises because what is in biological terms unitary—the hatching, raising and processing for consumption of a single broiler chicken—has been compartmentalized by the law and by industry economic imperatives.

A. The legal determinants of the line to be drawn are well settled. The National Labor Relations Act governs labor relations between employers in and affecting interstate commerce and their employees with one exception relevant here—NLRA § 2(3) defines the term "employee" to exclude "any individual employed as an agricultural laborer." 29 U.S.C. § 152(3). And, Congress, in riders to the Appropriations Acts for the National Labor Relations Board ("NLRB" or "Board"), has tied the definition of "agricultural laborer" in NLRA § 2(3) to the definition of "agriculture" in § 3(f) of the Fair Labor Standards Act ("FLSA"). *See Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 300 n.6 (1977).[1]

[1] FLSA § 3(f) provides, in full:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

As this Court has explained, the FLSA § 3(f) term "agriculture" has both a primary and a secondary meaning. "First, . . . [a]griculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning." *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762 (1949). The "raising of . . . poultry" is one of the express § 3(f) primary agricultural activities. *Supra* n.1. But "[s]laughtering, which is the antithesis of 'raising,' is not included" in the statutory definition of "raising . . . poultry." 29 CFR § 780.125.

In addition, and more broadly, "[a]griculture is defined [by FLSA § 3(f)] to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with 'such' farming operations." *Farmers Reservoir*, 337 U.S. at 763. An outer boundary of § 3(f) "agriculture," then—and the one relevant here—is set at non-farming practices performed on a farm "as an *incident to or in conjunction with* [the] farming operations" in question. *Supra* n. 1 (emphasis added).

At the same time, it is well settled that the *processing* of broiler chickens for ultimate sale to the consumer—*e.g.*, the slaughtering and dressing of the chickens—is *not* an FLSA § 3(f) agricultural activity.

This Court squarely held in *Bayside* that the fact that an integrated poultry company—one that, *e.g.*, hatches

chicks, puts the chicks out to independent farmers to be raised and then takes the full grown broilers and processes the birds—engages in (or contracts for the performance of) certain farming activities does not somehow render *all* of the company's activities agricultural in nature. To the contrary, where such a company has and runs a "mill . . . which . . . produces poultry feed and [a] processing plant in which it slaughters and dresses poultry," the mill and the plant are "*not* agricultural operations." *Bayside*, 429 U.S. at 301 (emphasis added). *See also Mitchell v. Budd*, 350 U.S. 473, 480-82 (1956).

It follows, said the *Bayside* Court, that "the status of . . . drivers" employed by the integrated poultry company who deliver feed from the company's mill to farmers who have contracts with the company to raise chickens "is determined by the character of the work they perform for their own employer," and that "the work of the contract farmer cannot make the drivers agricultural laborers." 429 U.S. at 303. On this cases *Bayside* holds that the integrated poultry company's feed mill drivers are "employees" within the meaning of NLRA § 2(3) and not "agricultural laborers" within the meaning of the exemption stated in that provision. *Id.*

B. The factual determinants of the line to be drawn here are equally definite.

By and large broiler chicken production is vertically integrated. *See, e.g., National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 821 (1978) ("All the members of NBMA are 'integrated,' that is, they are involved in more than one of these stages of production . . . . The member . . . places its chicks with [the] independent grower for the growing out period . . . and with its own employees, usually collects the mature chickens from the grower.").

Moreover, as this Court recognized in *National Broiler Mktg. Ass'n*, the integrated poultry companies have substantial economic leverage in their relationship with these independent contract farmers. 436 U.S. at 824-26.[2]

As here, the integrated poultry companies have almost invariably exercised their economic leverage (i) to limit the independent farmer's function to the raising of chickens; and (ii) to assure that the company's own processing plant employees—using the company's own equipment—perform all live haul operations.[3]

It is very much to the point that the integrated poultry companies have structured their contractual relationship with their independent farmers in this manner precisely to facilitate the efficient use of the companies' highly capitalized processing plants. The companies contract with numerous chicken-raising farms in the vicinity of the companies' processing plants, and when the chickens reach the proper age, size and weight the companies dispatch the companies' own live haul crews and equipment to collect the grown chickens. In this way the companies are able to secure for themselves the flexibility and the economies of scale that are essential in "supply[ing] wholesome products on a continual, reliable, and profit-

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[2] *See, e.g.*, P. Ahlo, *Broiler Grower Contracts in the United States*, Broiler Industry (Oct. 1988) 26 ("The broiler industry in the United States consists primarily of contract growers and large vertically integrated firms called integrators. The integrators, through ownership or control, coordinate the stages of production and distribution of broiler chickens."); M. Timmons & P. Ahlo, *A Broiler Production Analysis Equation*, 66 Poultry Science 586, 586 (April 1987) ("The growers provide the labor and capital for the growout stage without ever owning any broilers.").

[3] A 1977 survey of approximately 1000 contracts between integrated poultry companies and independent growers found that live haul operations were performed by the company itself in more than 95 percent of the cases. William L. Henson, *The U.S. Broiler Industry: Past and Present Status, Practices, and Costs*, Pennsylvania State University Agricultural Experiment Stations No. 149, at 20 (May 1980).

able basis." M. Eckman & R. Brewer, *The Commercial Broiler Industry*, Alabama Agribusiness (Auburn Univ. Cooperative Extension Service 1988) 2.

> Integration in the poultry industry permits the collection of large amounts of a uniform product available when needed. . . . In the case of broilers, turkeys, and fowl for meat, processing plants can coordinate production needs by hauling in flocks from several farms to supply the birds needed for the plant for a day.
>
> * * *
>
> . . . Most company trucks and cars now have two-way radios, permitting constant coordination between the plant and the farm. For example, if a truck breaks down or becomes stuck in the snow or mud, the processing plant has several hours to send in an alternate source of birds to keep the plant running near capacity. [C. Parkhurst & G. Mountney, *Poultry Meat and Egg Production* 151-52 (Van Nostrand Reinhold Co. 1988).]

All this being so, the various live haul functions at issue here are classified by the industry and by independent experts as a component part of the integrated poultry companies' "processing" operations and not as a component part of the contract farmers' chicken raising operations. Thus, trade publications and industry studies analyze the "processing" operation as consisting of distinct stages, including "assembling," "slaughtering," "eviscerating," "packaging," and "storage." As the Table set out below illustrates, the "assembling" stage is defined specifically to include the live haul "catching," "loading" and "transporting" functions performed by the integrated poultry company worker whose status is at issue here.

TABLE 10.1. Poultry-Processing Functions

[Parkhurst & Mountney, *supra*, 155 (emphasis added).]

Assembling	Slaughtering	Eviscerating	Additional processing uncooked
Catching *Loading* *Transporting* *Unloading*	Shackling Killing Bleeding Scalding Defeathering Washing Removing head and feet	Removing preen gland Opening and inspection of remaining viscera Separation of heart, gizzard and liver Washing Grading Weighing Chilling	Whole carcass Whole carcass cut up Individual parts Half carcasses Hand or mechanically deboned meat

Additional processing cooked	Packaging	Storage	Other
Cooked, deboned meat Fried battered parts Barbecued Canned whole or deboned Canned soups, stews, etc. Comminuted products Rolls Ham	Plastic bags with and without vacuum Tray with plastic overwrap Cardboard cartons including laminates and overwraps Metal, cardboard or wood ice-packed bulk containers	Ice packed Chilled Dry pack, refrigerated Frozen Canned Freeze or heat, dehydrated Irradiated (future)	Plant cleanup and sanitation Waste disposal Waste treatment and by-product recovery Insect and rodent control Plant and product safety Plant security Fiscal and personnel management

See also e.g. V. Benson, et al., *The Chicken Broiler Industry: Structure, Practices, and Costs,* Agricultural Economic Report No. 381 (U.S. Dep't of Agriculture 1977) (outlining industry trends in "processing" operations, defined to include, *inter alia,* "assembly," "slaughtering," and "eviscerating"); F. Lasley, et al., *The U.S. Broiler Industry,* Agricultural Economic Report No. 591 (U.S. Dep't of Agriculture 1988) (analyzing trends in "processing and transportation costs, which include assembling"); J. Beierlein, et al., *Optimizing the Assembly Processing-Distribution System of Processed and Further-Processed Chicken in Pennsylvania,* 8 Agribusiness 335 (1992) (analyzing the economic efficiency of the "assembly-processing-distribution system" utilized by the broiler industry in Pennsylvania).

C. It is against this legal and factual backdrop that the NLRB has consistently found that the integrated poultry companies' live haul workers are engaged in tasks incidental to the companies' non-exempt processing operations rather than tasks incidental to exempted farming operations:

> As the service crew employees involved herein are engaged in handling and transporting chicks on the farms of independent growers only after Respondent's farming operations have ended, these employees cannot be performing practices incident to, or in conjunction with, Respondent's farming operations. More accurately, they are engaged in nonfarming operations which are incident to, or in conjunction with, a separate and distinct business activity of the Respondent, i.e., shipping and marketing. [*Imco Poultry,* 202 NLRB 259, 260-61 (1973).]

Accord e.g. Draper Valley Farms, 307 NLRB 1440, 1440 (1990) ("[W]e find that the Employer's chicken catchers are engaged in activity incidental to a separate and nonfarming business activity of the Employer, and thus do not fall within the agricultural labor exemption contained in Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3).").[4]

D. The Board's position in the foregoing cases finds strong support in a Department of Labor interpretive regulation elaborating on FLSA § 3(f) that addresses the precise situation here.[5] The DOL regulation states, in pertinent part:

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[4] In *Draper,* the Board also fully (albeit summarily) disposed of the argument—which petitioners seek to assert in the alternative here although they did not assert it below (*see* Brief for Petitioners at 29-30)—that the catching of chickens constitutes "primary" agricultural activity:

> [W]e reject the Employer's contention that its chicken catchers are engaged in primary agricultural activity, namely "harvesting," as defined in Section 3(f) of the Fair Labor Standards Act, 29 U.S.C. § 203(f). Although the harvesting of crops is included in the primary definition of agriculture under Section 3(f), only the "raising" of poultry is covered, not its so-called harvesting, even assuming, arguendo, that term is appropriate in any context when applied to poultry. [307 NLRB at 1440 (footnote omitted).]

[5] The Department of Labor has been entrusted with the administration of the FLSA, and the Department's regulations interpreting the FLSA are therefore entitled to substantial deference. *E.g. Idaho Metal Works v. Wirtz,* 383 U.S. 190, 205 (1966); *Mitchell v. Budd,* 350 U.S. at 477-80. For that reason, this Court in *Bayside* looked to the DOL's interpretation of § 3(f) in reviewing and upholding the NLRB's decision that truck drivers employed by integrated poultry companies to deliver feed to their contract farmers are not "agricultural laborers" exempt from coverage under NLRA § 2(3). *See* 429 U.S. at 303. By the same token, the Court followed the DOL's lead in *Maneja v. Waialua Agricultural Co.,* 349 U.S. 254, 260-63 (1955). There the DOL had determined that workers employed by a farmer who transported sugar cane grown by the farmer on its plantation to the farmer's processing plant on that same plantation—which the farmer used for the sole purpose of processing its own sugar cane—were agricultural employees under FLSA § 3(f). While reasonable minds could differ on that line-drawing exercise it is beyond question that the workers ties to a single farmer on a single farm put those workers in a distinctly different position than the live haul workers here.

> The fact that a practice performed on a farm is not performed by or for the farmer is a strong indication that it is not performed in connection with the farming operations there conducted. Thus, where such an employer other than the farmer performs certain work on a farm solely for himself in furtherance of his own enterprise, the practice cannot ordinarily be regarded as performed in connection with farming operations conducted on the farm. [29 CFR § 780.143.]

And, as we have emphasized, the live haul functions at issue here, though performed in large measure *on* the farm of the independent farmer, are not performed *by* the farmer or *for* the farmer's own benefit. To the contrary, those functions are performed *by* the integrated poultry company itself *for* the benefit of the company's processing activities. *See supra* at 6-10.

Indeed, 29 CFR § 780.143 provides the short but complete answer to the contention of petitioners and their *amici* that the Board's position on the status of live haul workers in the broiler chicken industry is contrary to congressional intent. *See* Brief for the Petitioners at 13-19; Brief of Amicus Curiae California Agricultural Labor Relations Board ("Cal. Agr. Bd. Br.") at 10-12, 14-19; Brief Amicus Curiae for the American Farm Bureau Federation, et al. ("Am. Farm Bur. Br.") at 16-18.

Petitioners' *amici* accurately identify the congressional intent underlying the "on a farm" language in FLSA § 3(f): *viz.*, to make it clear that where a *farmer* for his own economic benefit utilizes an independent contractor to assist the farmer in the performance of tasks that the farmer would otherwise be required to do through the farmer's own employees, the contractor's employees are not subject to the FLSA. *See* Cal. Agr. Bd. Br. at 10-12, 14-19; Am. Farm Bur. Br. at 16-18.[6]

[6] Petitioners do not advert to the congressional intent to benefit the farmer that underlies FLSA § 3(f)'s "on a farm" language. Rather, petitioners present lengthy excerpts from discussions on the Senate floor regarding the "on a farm" language, *see* Brief for the Petitioners at 15-19, as if those discussions support petitioners' position. In truth, those discussions only underscore the point that the intent of Congress was to protect the interests of the *farmer* in situations where the farmer finds it necessary for his own economic benefit to turn to outside contractors to perform tasks on his farm the farmer would otherwise do himself. Petitioners have pointed to nothing in the legislative materials that evince a broader or different congressional purpose, or that speak to the specific line-drawing problem presented in this case involving integrated poultry companies that perform work on a farm with the companies' own employees and equipment for the benefit of the companies' own nonfarming operations.

But the situation here, as the NLRB has recognized, does *not* involve the contracting out of work by farmers for the farmers' own economic benefit. In the vertically integrated poultry industry the contract farmer's role ends when the broilers have been raised to maturity. At that point those farmers have no tasks to contract out. The only issue here, it bears repeating, is the proper characterization of work performed by integrated poultry companies through the companies' own employees using the companies' own equipment "in furtherance of [the companies'] own [nonfarming] enterprise[s]." 29 CFR § 780.143.[7]

[7] Petitioners' reliance on DOL Regulation § 780.126, which cites approvingly to *Johnston v. Cotton Producers Ass'n*, 244 F.2d 553 (5th Cir. 1957), is misplaced. *See* Brief for the Petitioners at 27-28. The live haul functions in *Johnston* were performed by an independent retail supply store for the benefit of the store's "farmer customers," 244 F.2d at 554, and not by a vertically integrated poultry company for the benefit of the company's own non-farming processing operations. DOL Regulation § 780.126 and *Johnston* are thus entirely consistent with DOL Regulation § 780.143 and with the congressional intent underlying FLSA § 3(f).

The result reached by the Fifth Circuit in *Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980), is, to be sure, in conflict with the principles stated in 29 CFR § 780.143, as well as with the consistently-held position of the NLRB and the decision of the Fourth Circuit below (although the *Coleman* case arose under the FLSA not the NLRA and the Fifth Circuit explicitly noted that no

E. In the face of all the foregoing, petitioners' last ditch argument is that the Board's determination in this matter is directly contrary to the "plain language" of § 3(f) of the FLSA, and on that account cannot stand. Brief for the Petitioners at 9, 12-13.

The plain statutory language in question states that "[a]griculture" includes activities "performed by a farmer or on a farm as an incident to or in conjunction with . . . farming operations." *Supra* n. 1, pp. 4-5. On its face—and as both the Department of Labor and the NLRB have recognized—the only thing plain is that § 3 (f) does *not* encompass all activity on a farm but only activity "incident to or in conjunction with farming operations" and does not settle with any plainness what is "incident to or [is] in conjunction with . . . farming operations" and what is incident to or is in conjunction with nonfarming operations.

That issue in the concrete setting of the vertically integrated poultry industry presents an occasion for line drawing by the Board in an area where Congress has not spoken directly to the "infinite variety of specific situations" that might arise in the application of FLSA § 3(f). *Gray v. Powell*, 314 U.S. 402, 412 (1941). "To determine upon which side of the median line the particular instance [in this case] falls calls for the expert, experienced judgment of those familiar with the industry." *Id.* at 413. As the *Bayside* Court recognized:

> Accordingly, regardless of how [this Court] might have resolved the question as an initial matter, the appropriate weight which must be given to the judgment of the agency whose special duty is to apply th[e] broad statutory language [in § 3(f)] to varying fact patterns requires enforcement of the Board's order. [429 U.S. at 304.]

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issue of appropriate deference to the NLRB was therefore presented, 629 F.2d at 1081 n.4). The *Coleman* Court, however, failed to even mention 29 CFR § 780.143, much less to deal with the economic realities in the vertically integrated broiler industry that bring this case squarely within the terms of that DOL regulation.

CONCLUSION

For the above stated reasons, and for the reasons set forth in the Brief for the Respondent Board, the judgment below should be affirmed.

Respectfully submitted,

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